

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BRANDON EDWARD GORECKI,

Defendant-Appellant.

UNPUBLISHED

October 2, 2008

No. 277448

St. Clair Circuit Court

LC No. 06-001587-FC

Before: Murray, P.J., and Whitbeck and Talbot, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial convictions of first-degree murder, MCL 750.316(1)(a), torture, MCL 750.85, armed robbery, MCL 750.529, larceny in a building, MCL 750.360, and larceny of more than \$1,000, MCL 750.356(3)(a). Defendant was sentenced to concurrent terms of life in prison for first-degree murder, 20 to 30 years for torture, 20 to 30 years for armed robbery, one to four years for larceny in a building, and two to five years for larceny of more than \$1,000. We affirm.

Defendant's sole issue on appeal is that the trial court improperly admitted statements made by codefendant Raymond Carp (defendant's brother) to Carp's girlfriend that addressed defendant's role in the murder. Whether a statement was made against the declarant's penal interest is a question of law reviewed de novo. *People v Barrera*, 451 Mich 261, 268; 547 NW2d 280 (1996). The findings of fact of the trial court are reviewed for clear error while the trial court's decision to admit or exclude the evidence is reviewed for an abuse of discretion. *Id.* at 269. An abuse of discretion occurs when a trial court chooses an outcome falling outside the range of reasonable and principled outcomes. *People v Babcock*, 469 Mich 247, 265; 666 NW2d 231 (2003).

Defendant argues that the admission of the non-testifying accomplice's (Carp) statements violated his confrontation rights as espoused in *Lilly v Virginia*, 527 US 116; 119 S Ct 1887; 199 L Ed 2d 117 (1999) and *Williamson v United States*, 512 US 594; 114 S Ct 2431; 129 L Ed 2d 476 (1994). We conclude, however, that this case is resolved by application of precedent from this Court and our Supreme Court.

Out-of-court statements that are offered for the truth of the matter asserted are considered hearsay and are not admissible unless there is an applicable exception. MRE 802. The pertinent exception here is MRE 804(b)(3), which states as follows:

A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

In *People v Poole*, 444 Mich 151, 165; 506 NW2d 505 (1993), our Supreme Court concluded that admitting a non-testifying co-defendant's statements against a defendant does not violate a defendant's right to confrontation if the prosecution can establish that (1) the declarant was unavailable, and (2) the statements bear an indicia of reliability or fall within a firmly rooted hearsay exception. The Court set forth the following factors for deciding whether there is a sufficient indicia of reliability to support admission:

[W]hether the statement was (1) voluntarily given, (2) made contemporaneously with the events referenced, (3) made to family, friends, colleagues, or confederates—that is, to someone to whom the declarant would literally speak the truth, and (4) uttered spontaneously at the initiation of the declarant and without prompting or inquiry by the listener.

On the other hand, the presence of the following factors would favor a finding of inadmissibility: whether the statement (1) was made to law enforcement officers or at the prompting or inquiry of the listener, (2) minimizes the role or responsibility of the declarant or shifts blame to the accomplice, (3) was made to avenge the declarant or to curry favor, and (4) whether the declarant had a motive to lie or distort the truth.

In considering the above factors relative to the totality of the conversation between Carp and his girlfriend, the trial court correctly concluded that the testimony was admissible as Carp was undisputedly unavailable to testify, and his statements meet all of the factors in favor of admissibility. Carp volunteered the information to his girlfriend within days of the murder. His girlfriend is someone that Carp would be expected to be truthful with when imparting this type of information. There is no evidence that Carp's girlfriend prompted the statements. Indeed, she testified that she did not ask questions but simply listened to Carp as he recalled the events of the incident. There is no evidence that Carp had a motive to lie at this point. Furthermore, Carp's invocation of the "pinky swear" rule—albeit a bit juvenile—evidences that he was telling the truth and not expecting this information to be used in a court of law or elsewhere.¹ Thus, the statements were properly admitted and did not violate defendant's confrontation rights. *Poole*, *supra*; *People v Beasley*, 239 Mich App 548, 556; 609 NW2d 581 (2000).

¹ Moreover, defendant admitted at trial to the killing, and there is ample additional evidence establishing that the killing was premeditated and deliberated.

Defendant argues that *Williamson, Dorchy v Jones*, 398 F3d 783 (CA 6, 2005), and *Vincent v Seabold*, 226 F3d 681 (CA 6, 2000), are controlling in this case. However, *Williamson* did not address a federal constitutional question, as it remanded the matter before it based on its interpretation of the Federal Rules of Evidence (FRE 804(b)(3)), *Williamson, supra* at 600-601, 604, and thus provides no authority for defendant's constitutional argument in the matter before us. Our Court in *Beasley* squarely addressed and rejected the precise argument made by defendant here, i.e., that *Williamson* and *Lilly* apply, rather than *Poole*. *Beasley, supra* at 554-559. Furthermore, *Vincent* and *Dorchy* are distinguishable from the case at bar as *Vincent* involved the exclusion of testimonial co-defendant statements that were made to police officers, *Vincent, supra* at 684-686, while *Dorchy* involved testimonial statements that were made at the prompting of an attorney during a direct examination at a previous trial that shifted the blame from the declarant to the defendant in the case at bar, *Dorchy, supra* at 786, 789-791. Here, defendant has not argued that Carp's statements were testimonial. Additionally, the statements in *Vincent* and *Dorchy* involved statements that lacked an indicia of reliability, *Poole, supra* at 165. Hence, they are not controlling in this case.

Affirmed.

/s/ Christopher M. Murray
/s/ William C. Whitbeck
/s/ Michael J. Talbot